No. 04-1327

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In The

Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF *AMICUS CURIAE* OF FORTY PROFESSORS OF EVIDENCE LAW IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Brief of Forty Professors of Evidence Law as *Amici Curiae* In Support of Petitioner	1
Interest of *Amici Curiae*	1
Summary of Argument	1
Argument	3
The South Carolina Supreme Court Held that it was Proper to Entirely Exclude Petitioner's Primary Factual Claim of Innocence from his Jury Trial for Capital Murder Because that Court was Convinced by the State's Evidence that Petitioner is Guilty. That Decision Violated Petitioner's Sixth Amendment Right to Trial by Jury, and in Consequence it also Violated his Sixth and Fourteenth Amendment Rights to Compulsory Process, to Present a Defense, and to be Convicted Only by Proof Beyond a Reasonable Doubt	3
Conclusion	20
Appendix: List of *amici curiae*	A1

TABLE OF AUTHORITIES

Page

CASES

Birmingham v. State, 27 S.W.3d 351 (Ark. 2000) 13

Blakely v. Washington, 542 U.S. 296 (2004) 12, 16

California v. Trombetta, 467 U.S. 479 (1984) 16

Chambers v. Mississippi, 410 U.S. 284 (1973) 17, 18, 19

Chambers v. State, 252 So. 2d 217 (Miss. 1971) 18, 19

Cool v. United States, 409 U.S. 100 (1972) 16

Crane v. Kentucky, 476 U.S. 683 (1986) 16

Crawford v. Washington, 541 U.S. 36 (2004) 11

Faretta v. California, 422 U.S. 806 (1975) 16

In re Winship, 397 U.S. 358 (1970) 16

In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 438 S.E.2d 501 (W. Va. 1993) 10

McCulloch v. Maryland, 17 U.S. 316 (1819) 14

People v. Yeoman, 72 P.3d 1166 (Cal. 2003) 13

State v. Fortin, 843 A.2d 974 (N.J. 2004) 13

State v. Francis, 836 A.2d 1191 (Conn. 2003) 13

State v. Gay, 541 S.E.2d 541 (S.C. 2001) 8, 15

State v. Gregory, 16 S.E.2d 532 (S.C. 1941) 6, 8

State v. Holmes, 464 S.E.2d 334 (S.C. 1995) 3

State v. Holmes, 605 S.E.2d 19 (S.C. 2004) 3, 8, 9, 14, 17

State v. Holterman, 687 P.2d. 1097 (Ore. App. 1984) 13

State v. Williams, 593 N.W.2d 227 (Minn. 1999) 15

TABLE OF AUTHORITIES – Continued

Page

State v. Wilson, 406 N.W.2d 442 (Iowa 1987) 13

United States v. Scheffer, 523 U.S. 303 (1998) 19

Wardius v. Oregon, 412 U.S. 470 (1973) 19

Washington v. Texas, 388 U.S. 14 (1967) 16

STATUTES AND RULES

Federal Rule of Evidence 403 13

Federal Rule of Evidence 801(d)(1)(A) 6, 7

South Carolina Rule of Evidence 403 13

South Carolina Rule of Evidence 801(d)(1)(A) 7

South Carolina Rule of Evidence 804(b) 7

South Carolina Rule of Evidence 804(b)(3) 7

OTHER AUTHORITIES

The Associated Press, *Police Chemist is Rebutted After Man's Execution*, New York Times, 8/30/01, p. A12 10

Andrew Bluth, *Illinois Man Is Finally Cleared in 2 Murders*, New York Times, 3/12/99, p. A20 11

Anne Constable, *Profiles of the Exonerated*, Santa Fe New Mexican, 7/02/00, p. A6 11

Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 10

Bill Dedman, *DNA Tests Are Freeing Scores of Prison Inmates*, New York Times, 4/19/99, p. A12 11

TABLE OF AUTHORITIES – Continued

Page

Beth DeFalco & Dennis Wagner, *1st Day Out as a Free Man Inmate Saved by DNA Dives Into Life, Political Debate*, Arizona Republic, 4/10/02, p. 1A 11

Stephen M. Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?* 76 Neb. L. Rev. 272 (1997) 13

Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439 (1997) 10

Mark Hansen, *Trooper's Wrongdoing Taints Cases*, A.B.A. J., Mar. 1994, p. 22 10

Roma Khanna, *Police Turn Up Hundreds of Boxes of Evidence from Crime Lab*, Houston Chronicle, 8/26/04 available at http://www.chron.com/content/chronicle/special/03/crimelab/index.html 9

David McCord, *"But Perry Mason Made it Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else Is Guilty*, 63 Tenn. L. Rev. 917 (1996) 13

Maurice Possley et al., *Scandal Touches Even Elite Labs; Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chicago Tribune, 10/21/04, p. 1 9

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TABLE OF AUTHORITIES – Continued

Page

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Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, New York Times, 6/15/96, p. A6 11

Michael Vigh, *Evidence Bungled in Slaying; Fingerprints thought to be the defendant's actually the victim's; Motel 6 Case Prosecutors Get Print Surprise*, Salt Lake Tribune 2/19/03, p. D1 9

BRIEF OF FORTY PROFESSORS OF EVIDENCE LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

This brief *amicus curiae* is submitted on behalf of forty professors of law who teach the law of evidence at various law schools across the United States. They are identified by name and position in the Appendix to this brief. Petitioner Bobby Lee Holmes and Respondent the State of South Carolina have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE*

Amici teach, study and write about the law of evidence as applied by the state and federal courts of the United States. They have a professional interest in the issues presented by this case.

SUMMARY OF ARGUMENT

Petitioner Bobby Lee Holmes was convicted of rape and capital murder and sentenced to death. His main defense was that these crimes were committed by another man. Holmes attempted to call witnesses to prove this defense, including several who would have testified that the other suspect made statements confessing his guilt. The trial court excluded all of this evidence because it

[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

concluded, erroneously, that these statements were inadmissible as hearsay under South Carolina Law.

On appeal, the South Carolina Supreme Court ignored the trial court's hearsay ruling but affirmed the exclusion of Holmes' defense evidence under South Carolina's rule limiting evidence of third party guilt. As reinterpreted in this case, that rule precluded Holmes from presenting his defense that another person had committed these crimes because, in the opinion of the South Carolina Supreme Court, the state's evidence of guilt was so strong that Holmes could not "raise a reasonable inference of his own innocence."

This holding is a denial of Petitioner's right to trial by jury, and a dangerous precedent. It is presented as a rule of evidence, but it is no such thing. It has no parallel in any American common law or statutory rule of evidence known to *amici*. The state supreme court did not purport to exclude particular items of evidence because they were irrelevant or unfairly prejudicial, or for any other traditional purpose that is consistent with preserving and protecting the jury's role as the trier of fact. Instead it approved the exclusion of Holmes' entire defense – regardless of the quality of the evidence he might have presented – because the court was convinced by the state's evidence that he is guilty. Under the rule adopted by the South Carolina Supreme Court, once a trial court judge concludes that a defendant is guilty, that defendant is not entitled to a jury trial on his defense. This rule is a judicial usurpation of the jury's constitutional authority to decide guilt or innocence in criminal prosecutions; it violates the Sixth and Fourteenth Amendments.

Because Petitioner was denied his right to a jury trial on the facts of his defense, he was also denied other constitutional rights in the truncated trial at which he was convicted: his Sixth Amendment right to compulsory process to obtain witnesses in his favor, his Sixth and Fourteenth Amendment right to present a defense, and his Fourteenth Amendment due process right to be convicted only if his guilt is proved beyond a reasonable doubt.

ARGUMENT

The South Carolina Supreme Court Held that it was Proper to Entirely Exclude Petitioner's Primary Factual Claim of Innocence from his Jury Trial for Capital Murder Because that Court was Convinced by the State's Evidence that Petitioner is Guilty. That Decision Violated Petitioner's Sixth Amendment Right to Trial by Jury, and in Consequence it also Violated his Sixth and Fourteenth Amendment Rights to Compulsory Process, to Present a Defense, and to be Convicted Only by Proof Beyond a Reasonable Doubt.

The fundamental issue in this case is the right to trial by jury. The defendant, Bobby Lee Holmes, was convicted of capital murder and sentenced to death.[2] The trial judge excluded all evidence on Holmes' primary factual defense, and the South Carolina Supreme Court affirmed by a vote

[2] Holmes was tried twice. *See State v. Holmes*, 320 S.C. 259, 464 S.E.2d 334 (1995), and *State v. Holmes*, 361 S.C. 333, 605 S.E.2d 19 (2004). Our description of the case is limited to the second trial, the one which is before this Court on review.

of four to one. The state supreme court concluded that Holmes had no right to a jury decision on the facts of his defense because – in that court's judgment – the evidence against him was too strong to permit a finding of innocence. Short of banishing the jury altogether, it is hard to imagine a more basic violation of a criminal defendant's constitutional right to trial by jury, as guaranteed by the Sixth and Fourteenth Amendments. Because Holmes was denied his right to a jury trial on the facts of his defense, he was also denied several other constitutional rights in the truncated jury trial at which he was convicted and condemned: the right to compulsory process to obtain witnesses in his favor, the right to present a defense, and the right to be convicted only if his guilt is proved beyond a reasonable doubt.

The victim in this case, an eighty-six year old woman, was beaten and anally raped by a man who forced his way into her home. She suffered serious brain injuries, lapsed into unconsciousness several hours after the attack, and died ten weeks later. The victim never identified her attacker, and no other witnesses placed the defendant at the scene of the crime. The only evidence that did place Holmes at the scene of this crime was forensic: a palm print said to have come from the victim's apartment, and blood and fiber evidence from the scene and from the defendant's clothing. Biological samples were taken from the victim for two rape kits, but some were compromised and others were lost; they yielded no identifiable evidence.

Holmes claimed that the state's forensic evidence was planted and mishandled, and that the rape and murder were committed by another man, Jimmy McCaw White. He presented his evidence of Jimmy White's guilt at a pretrial hearing held for the sole purpose of determining

admissibility of that evidence. Three witnesses testified that they saw White near the victim's house at about the time of the crime, and a fourth testified that she heard a man who might have been White; four other witnesses testified that they heard White say, variously, that he knew that Holmes was innocent, that he knew who really did these crimes, that he himself raped and killed the victim, and that he "liked" older women. Jimmy White himself was called and voluntarily testified at the pre-trial hearing. White denied that he had committed these crimes, and denied making the statements to which the defense witnesses had testified; White offered an alibi, but the man he claimed to have been with was also called and testified that he had not been with White at the time of the crime. After hearing these witnesses, the trial judge excluded all evidence about Jimmy White from Holmes' trial. That ruling gutted Mr. Holmes' defense.

The trial court's ruling was based on its interpretation of two rules of evidence:

(1) *Evidence of third party guilt.* The trial judge applied the special South Carolina rule that limits the evidence a criminal defendant can offer to prove that another person committed the crime with which the defendant is charged.

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534-35 (1941) (quoted in the trial court's order of 8/23/2000, *see* Cert. Pet. at 20a). The trial judge agreed that Holmes' evidence appeared to meet this standard. Indeed, how could it not? If the defense witnesses are believed, White is guilty and Holmes is innocent.

(2) *Hearsay.* The trial court judge, however, also ruled that all of the evidence of Jimmy White's admissions of guilt was hearsay, and was inadmissible because it did not qualify for the hearsay exception for statements against interest under South Carolina Rule of Evidence (SCRE) 804(b)(3). In the absence of those confessions, the trial judge found that the "train of evidence" that was required by *State v. Gregory, supra*, was missing its "engine" and included "no facts or circumstances which clearly point to White . . . as the person guilty of beating and raping" the victim, and therefore that the non-hearsay testimony placing White near the scene of the crime was also inadmissible. Cert. Pet. at 23a-24a.

The South Carolina Supreme Court did not endorse (or mention) the trial court's ruling on hearsay, probably because it was insupportable. In South Carolina, evidence of any inconsistent statement by a witness who testifies in the trial at issue is exempt from the hearsay rule.[3] Jimmy

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[3] South Carolina Rule of Evidence 801(d)(1)(A) provides in relevant part:

> (d) **Statements Which Are Not Hearsay.** A statement is not hearsay if –
>
> (1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony. . . .

(Continued on following page)

White testified at the pre-trial hearing, and presumably would have testified at trial if the trial court had not prevented the defendant from calling him. He denied attacking or raping the victim, and he denied making the statements that were attributed to him. Prior statements by White admitting to those crimes are, of course, inconsistent with his testimony; therefore, under South Carolina law, testimony by witnesses who heard him make such statements is not hearsay.[4]

Nonetheless, the South Carolina Supreme Court affirmed the trial court's ruling on a basis that had not been considered at trial. While the trial judge misapplied a

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(Under the parallel federal rule, codified in Federal Rule of Evidence 801(d)(1)(A), a prior inconsistent statement is only admissible as non-hearsay if it was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.")

[4] It is not relevant to the issues before this Court, but the trial court was also mistaken in its application of SCRE 804(b)(3), governing the "statement against interest" exception to the hearsay rule (which is identical to the parallel federal rule). The trial court concluded that White's extra-judicial confessions were inadmissible under SCRE 804(b)(3) because they did not satisfy the requirement that "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In fact, the hearsay exception codified in Rule 804(b)(3) has no application to this case at all. It is limited to statements by a declarant who is *unavailable* to testify at trial. *See* SCRE 804(b). White, of course was available; he testified at the pre-trial hearing and would have testified at trial if the trial judge had permitted it. Such testimony at trial would not only have eliminated the concern for reliability that gives rise to the "trustworthiness" requirement of 804(b)(3), but also – under South Carolina law – it would have removed White's prior inconsistent statements from the hearsay rule entirely. *See* SCRE 801(d)(1)(A), discussed *supra*.

traditional rule of evidence, the state supreme court created a new rule, a rule of exclusion that is unprecedented in any common law jurisdiction. The court did not merely exclude the *evidence* Holmes offered, it excluded an entire line of *defense*, regardless of the evidence that could be offered in support – and it did so because the court was persuaded by other evidence that the defendant must be guilty.

Specifically, the South Carolina Supreme Court held that all of the evidence about Jimmy White was inadmissible under its precedents limiting evidence of third party guilt. The court cited *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001), which was decided after the pre-trial hearing in *Holmes*. In *Gay* the South Carolina Supreme Court held that "[i]n view of the strong evidence of appellant's guilt . . . the proffered evidence about [alternative suspect] Metz did not raise 'a reasonable inference' as to appellant's own innocence," and was therefore inadmissible under *State v. Gregory, supra*. *State v. Gay*, 541 S.E.2d at 545.

The holding in *Gay*, however, was based in large part on the weakness of the defendant's evidence that Metz was in fact guilty: "[W]hile the proffered evidence about Metz may have established evidence of motive and opportunity for Metz to kill the victim, *the evidence simply was not inconsistent with appellant's guilt.*" *Id.* (emphasis added). Plainly, that rationale does not apply here: if Jimmy White's confessions are believed, then Holmes must be innocent. Not surprisingly, the South Carolina Supreme Court in *Holmes* neglected this aspect of the balance it struck in *Gay*. Its discussion of the "standard for admitting third party guilt," 605 S.E.2d at 23-24, includes no mention whatever of any weaknesses in Holmes' evidence of Jimmy White's guilt. Instead, the court summarized a

different body of evidence, the prosecution's forensic evidence against Holmes, and concluded that it was "overwhelming." That judgment was the basis for the court's holding:

> Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

605 S.E.2d at 24. As the South Carolina Supreme Court explained, Holmes may not present his defense to the jury because, in the court's view,

> He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence.

Id.

This holding is incompatible with the defendant's Sixth Amendment right to trial by jury.

Holmes claims that he was the victim of police incompetence in handling critical forensic evidence. This is not a far-fetched claim; it happens all too often.[5] He also says

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[5] *See, e.g.*, Richard Serrano & Ronald Ostrow, *Probe of FBI Lab Reviews 3,000 Cases, Affects None; Trials: Decisions on whether sloppy work biased convictions were left to prosecutors, who rarely notified defense attorneys*, Los Angeles Times, August 17, 2000, p. A1; Michael Vigh, *Evidence Bungled in Slaying; Fingerprints thought to be the defendant's actually the victim's; Motel 6 Case Prosecutors Get Print Surprise*, Salt Lake Tribune 2/19/03, p. D1.; Roma Khanna, *Police Turn Up Hundreds of Boxes of Evidence from Crime Lab*, Houston Chronicle, 8/26/04 (one of dozens of articles on massive crisis at the Houston Police Dept. Crime Lab available at http://www.chron.com/content/chronicle/special/03/crimelab/index.html); Maurice Possley et al., *Scandal Touches Even Elite Labs; Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chicago Tribune, 10/21/04, p. 1.

that he was the victim of forensic fraud by the police, or at least by one police officer. Unfortunately, this too is a realistic possibility. Horrifying patterns of forensic fraud have come to light repeatedly in the last two decades,[6] and other similar incidents, no doubt, remain hidden from view. Holmes argues that he was convicted and sentenced to death for crimes that another man committed. We know that many defendants have in fact been convicted and sentenced to death in the United States for murders they did not commit.[7]

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[6] *See, e.g., In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501 (W. Va. 1993) (judicial investigation of numerous cases of forensic fraud by West Virginia State Trooper Fred Zain); James Walker, ABC World News Tonight, 2/15/94 ("ABC News has found that in just the last five years police have faked prints in New York, California, Alabama, Arizona, Oklahoma, Tennessee, and in Georgia, where Officer Ray Edwards went to jail after he admitted faking fingerprints in twenty-nine cases.") (cited in Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439 (1997)); Mark Hansen, *Trooper's Wrongdoing Taints Cases*, A.B.A. J., Mar. 1994, p. 22 (New York State Police Trooper faked fingerprint evidence); The Associated Press, *Police Chemist is Rebutted After Man's Execution*, New York Times, 8/30/01, p. A12 (false testimony by Oklahoma City police scientist Joyce Gilchrist); John Solomon, *Conviction Overturned in FBI Scandal, the misconduct of a lab scientist was cited*, Philadelphia Inquirer, 5/28/03, p. A10. *See generally* Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories, supra.*

[7] The Death Penalty Information Center has identified 122 American defendants who were sentenced to death and then legally exonerated and released from death row since 1973. *See* http://www.deathpenaltyinfo.org/article.php?scid=6&did=110. Fifteen were exonerated on the basis of DNA evidence, and many others on the basis of evidence proving the guilt of another person, *see infra* note 8, or other equally compelling evidence of innocence.

Frequently these innocent capital defendants were exonerated when the real killer was identified and his guilt proven years after the initial false conviction.[8]

We do not know whether Bobby Lee Holmes is innocent or guilty of the crimes for which he was convicted and condemned to death. It is not for us to say, nor for this Court, nor for any other group of onlookers or judges. This is a decision that should have been made by the jurors who tried Holmes, but the South Carolina judiciary decided to do it for them. The trial court excluded the main evidence in his defense because it misinterpreted the hearsay rule, and the South Carolina Supreme Court affirmed on an even more disturbing basis: because a majority of the justices believed that he was clearly guilty. But the right to a trial by jury is not limited to defendants who "can raise a reasonable inference" that they are innocent. The Sixth Amendment has no exception for defendants who face "overwhelming evidence" from the state. As this Court stated in *Crawford v. Washington*, 541 U.S. 36, 62 (2004), "dispensing with jury trial because a defendant is obviously

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[8] *See, e.g.*, Anne Constable, *Profiles of the Exonerated*, Santa Fe New Mexican, 7/02/00, p. A6 (Thomas Gladish, Richard Gree, Ronald Keine and Clarence Smith, exonerated in New Mexico in 1976); Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, New York Times, 6/15/96, p. A6 (Dennis Williams and Verneal Jimerson, exonerated in Illinois in 1996 along with non-capital co-defendants Kenneth Adams and William Rainge); Andrew Bluth, *Illinois Man Is Finally Cleared in 2 Murders*, New York Times, 3/12/99, p. A20 (Anthony Porter, exonerated in Illinois in 1999); Bill Dedman, *DNA Tests Are Freeing Scores of Prison Inmates*, New York Times, 4/19/99, p. A12 (Ronald Williamson, exonerated in Oklahoma in 1999 along with non-capital co-defendant Dennis Fritz); Beth DeFalco & Dennis Wagner, *1st Day Out as a Free Man Inmate Saved by DNA Dives Into Life, Political Debate*, Arizona Republic, 4/10/02, p. 1A (Ray Krone, exonerated in Arizona in 2002).

guilty . . . is not what the Sixth Amendment prescribes." The predicate facts that the South Carolina Supreme Court relied on to exclude the defendant's evidence – the likelihood that the defendant is innocent, the strength of the evidence of his guilt – are precisely the facts that the jury, not the court, must decide.

In *Blakely v. Washington*, 542 U.S. 296 (2004) this Court considered a flexible rule that would govern the extent to which the right to trial by jury limits the permissible scope of fact finding by the judge, rather than the jury, in the process of sentencing. As the Court described it,

> What this [proposed rule] means in operation is that the law must not go too far – it must not exceed the *judicial estimation* of the proper role of the *judge*.

542 U.S. at 307 (emphasis added). The Court rejected that rule, and held that the Constitution prohibits such judicial determinations of the scope of the right to a trial by jury, because

> [T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

Id. at 308. In the present case, the South Carolina Supreme Court held that Holmes was not entitled to try to convince a jury of his innocence because a majority of the judges on that court were convinced of his guilt. This is a more basic violation of the constitutional principle articulated in *Blakely* than any possible rule the Court considered in *Blakely* itself.

To be sure, there are many situations in which trial courts must evaluate evidence in order to determine its admissibility. The most common is the judge's discretionary authority to exclude evidence because its probative value is substantially outweighed by the danger of unfair prejudice, confusion or waste of time. *See* SCRE 403 and its twin, Federal Rule of Evidence 403. And there are legitimate reasons to be concerned about evidence of third party guilt: it may be vague or speculative; it may have low probative value; it may distract or confuse or prejudice the jury by interjecting extraneous issues. Accordingly, many other states regulate the admissibility of such evidence. But they do it under rules that in one form or another embody the logic of Rule 403. They focus on the evidence that is offered and evaluate its strengths and weaknesses on its own terms.[9]

That, emphatically, is not what the South Carolina Supreme Court did here. The court did not find that Holmes' evidence was unfairly prejudicial or confusing, or that it had low probative value. It focused its attention

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[9] *E.g., State v. Fortin*, 843 A.2d 974, 1002-04 (N.J. 2004) (evidence purporting to suggest third party guilt inadmissible because irrelevant); *People v. Yeoman*, 72 P.3d 1166, 1203-04 (Cal. 2003) (evidence of third party guilt must connect that party to the actual commission of the crime); *State v. Francis*, 836 A.2d 1191, 1199-2000 (Conn. 2003) (same); *Birmingham v. State*, 27 S.W.3d 351, 359-60 (Ark. 2000) (same); *State v. Wilson*, 406 N.W.2d 442, 446-47 (Iowa 1987) (evidence of third party guilt inadmissible because of low probative value and high danger of prejudice); *State v. Holterman*, 687 P.2d. 1097, 1100-01 (Ore. App. 1984) (same). *See generally* Stephen M. Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?* 76 Neb. L. Rev. 272 (1997); David McCord, *"But Perry Mason Made it Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else Is Guilty*, 63 Tenn. L. Rev. 917 (1996).

entirely on the prosecution's evidence, which the court concluded was so "overwhelming" that no rational defense was possible. The dissenting justice below (not to mention the defendant) had a different view:

> [A]ppellant presented evidence of mishandling, for example the collection of evidence at the scene using grocery bags from the victim's kitchen, the mislabeling of samples at the lab, and the loss of all blood samples collected from the victim. Further, appellant proffered evidence that representatives of the State had admitted manufacturing blood and palm print evidence against him.

State v. Holmes, supra, 605 S.E.2d at 26 (Pleicones, J., dissenting). We are in no position to judge this dispute, except to note the obvious: what is at stake when evidence is weighed in this fashion is not the admissibility of any particular item or line of inquiry, but rather the global question of the defendant's guilt.[10]

The common law of evidence is in large measure a set of rules that govern the circumstances under which judges may keep evidence from juries. This power must be carefully bounded. Just as "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316, 431

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[10] The South Carolina Supreme Court did not purport to base its affirmance on a finding that the exclusion of Holmes' evidence was harmless error; nor could it, given the nature of the excluded evidence. Neither is there any suggestion that the courts below were acting to protect Jimmy White's privacy or reputation; the pre-trial testimony against him was given in open court, and he is discussed by name in the published opinion of the South Carolina Supreme Court. In any case, such considerations could not have justified denying a capital defendant the right to present his defense to the jury.

(1819), the power to exclude is the power to decide. We know of no other common law rule of evidence, and no statutory rule in any common law jurisdiction, that permits a court to exclude an entire category of evidence of the defendant's innocence because the court is convinced of his guilt.[11] Nor do we see any limiting principle here. Alibi evidence may also be troublesome or misleading. If this rule is allowed to stand, what would prevent South Carolina or any other state from deciding that a defendant may not present alibi evidence, no matter how strong, if the court is convinced by the state that "he simply cannot . . . raise a reasonable inference of his own innocence"?

If the case against Mr. Holmes truly were overwhelming – if in fact no evidence of another man's guilt could "raise a reasonable inference" that Holmes was innocent – then surely the jury would also have reached that conclusion. On the other hand, if, after hearing all the evidence, the jury thought otherwise, then the jury's decision must

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[11] *State v. Williams*, 593 N.W.2d 227 (Minn. 1999) is similar to the South Carolina Supreme Court's earlier decision in *State v. Gay*, *supra*. In *Williams* the Minnesota Supreme Court excluded evidence that merely showed that a third party had a motive to commit the charged crimes primarily because that evidence "was not sufficient to establish the required . . . foundation," *id.* at 234, of a direct connection between the third party and those crimes. But the *Williams* court added: "Moreover, there was substantial evidence that [the third party] did not commit the charged crimes," including strong evidence that the defendant *did* commit those crimes. *Id.* We are troubled by these cases because they rely in part on prosecution evidence of the defendant's guilt as a factor in decisions to exclude defense evidence of innocence, even though the defense evidence was tangential and could have been excluded on other grounds. Nonetheless, such holdings are a far cry from the rule in this case: that *any* evidence on an entire line of defense may be excluded because unrelated evidence has convinced the court that the defendant is guilty.

govern, not that of the South Carolina Supreme Court. That is what juries are for. We trust juries to make these decisions, not judges. We have built our entire system of criminal investigation and adjudication on that foundation. Our best hope for avoiding false convictions, or even false executions, is a properly functioning system of trial by jury. In any event, that choice is embodied in our Constitution:

> There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.

Blakely v. Washington, supra, 542 U.S. 296 at 313.

The denial of Holmes' right to a jury decision on his guilt or innocence contaminated his trial, and deprived him as well of several other rights that "are essential to due process of law in a fair adversary process." *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975). Holmes was permitted to call his witnesses before the trial judge but not before the jury that actually tried and convicted him, in violation of his Sixth Amendment right to compulsory process to obtain witnesses in his favor, *Washington v. Texas*, 388 U.S. 14 (1967), and in violation of his Sixth and Fourteenth Amendment right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Holmes was also deprived of his due process right to be convicted only if his guilt is proved beyond a reasonable doubt – to his jury. *In re Winship*, 397 U.S. 358 (1970). In *Cool v. United States*, 409 U.S. 100, 104 (1972), this Court held that an instruction that improperly limited

the jury's consideration of testimony by an accomplice who was called by the defense violated *In re Winship* by "substantially reducing the Government's burden of proof." The violation here is worse: the defense witnesses were excluded altogether. Of course, the South Carolina Supreme Court's conclusion that Holmes could not "raise a *reasonable inference* of his own innocence," 605 S.E.2d at 24 (emphasis added), could well mean that after considering the defense as well as the prosecution evidence *the state supreme court* found Holmes guilty beyond a reasonable doubt. If so, that only underlines the central problem: that *court* had no constitutional authority to make that decision.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court reviewed a murder trial that was in some respects similar to the case before the Court now. Chambers was convicted of killing a police officer; his defense was that a different man, Gable McDonald, had actually shot and killed the victim. McDonald (like Jimmy White in this case) was present at or near the scene of the crime, and there was evidence that McDonald later admitted his guilt four times, one of them in writing and under oath. At a preliminary hearing, however, McDonald repudiated his confessions and testified that he did not shoot the officer. At trial Chambers called a witness who testified that he saw McDonald shoot the officer, and another who saw McDonald with a gun soon after the shooting. Chambers then called McDonald himself and introduced his sworn out-of-court confession. Under questioning from the prosecution, however, McDonald promptly repudiated that confession once again, and the trial court applied Mississippi's "voucher" rule to prevent Chambers from cross-examining McDonald on that repudiation. The trial court

also excluded as hearsay testimony from three witnesses who heard McDonald orally admit to the killing. The Mississippi Supreme Court affirmed both exclusionary rulings. *Chambers v. State*, 252 So. 2d 217 (Miss. 1971). This Court reversed because

> the exclusion of this critical evidence [of McDonald's oral admissions], coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.

Chambers, supra, 410 U.S. at 302.

Chambers, as the Court pointed out, "establish[ed] no new principles of constitutional law." 410 U.S. at 302. Neither should the present case. Here, as in *Chambers*, the defendant was deprived of the fair trial he was entitled to under time-honored constitutional principles – in this case, the defendant's right to a decision by the jury on his innocence or guilt. But the constitutional deprivation here is worse than that in *Chambers* in two respects:

First, Chambers was allowed to present substantial evidence that Gable McDonald was the real killer, and to argue that defense to the jury. The Court reversed nonetheless because

> Chambers' defense was *far less persuasive* than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted.

410 U.S. at 294 (emphasis added). Holmes, by contrast, was not allowed to present any evidence whatever on Jimmy White's guilt.

Second, evidence in Chambers' defense was excluded by "narrow and unrealistic," 410 U.S. at 298, and "mechanistic," 410 U.S. at 302, applications of state-law rules that governed the presentation of evidence by all parties in all trials, civil or criminal – the hearsay rule, and the archaic "voucher" rule that limited a party's right to cross examine and impeach a witness it had called. Holmes' defense, on the other hand, was excluded in its entirety under a special rule that applies to criminal defendants only. *See United States v. Scheffer*, 523 U.S. 303, 316 n. 12 (1998) (noting concern about a rule that "burdened only the defense and not the prosecution"); *Wardius v. Oregon*, 412 U.S. 470, 474-75 (1973) (same).

The constitutional error here is particularly disturbing because it reaches beyond the rights of this individual defendant. In *Chambers* the trial judge violated the Constitution by his rulings on evidentiary objections in that single case, and the Mississippi Supreme Court affirmed on the ground that the judge "did not abuse his discretion." *Chambers v. State, supra*, 252 So. 2d at 220. Accordingly, as the Court noted at the time and since, the decision in *Chambers* was limited to the facts of the case. *Chambers, supra*, 410 U.S. at 302-03; *Scheffer, supra*, 523 U.S. at 316. The problem here is more serious because the South Carolina Supreme Court has published and applied a general rule. Under the opinion below, any evidence of another person's guilt, regardless of its nature, will be kept from the jury in any criminal trial in South Carolina, if the trial judge (or the state supreme court) decides that the prosecution's evidence is "overwhelming."

CONCLUSION

The South Carolina rule on evidence of third party guilt, as elaborated by the state supreme court in this case, is a wolf in sheep's clothing. In form, it is a procedural rule that excludes defense evidence if the requirements for admissibility are not met. In substance it is a judicial usurpation of the jury's constitutional authority to decide the defendant's guilt or innocence: It gives the court the power to prevent the jury from ever hearing the main evidence of the defendant's innocence if the judge is convinced by other evidence that the defendant must be guilty.

THEREFORE, and for the reasons stated above, *amici* respectfully request this Court to reverse the judgment of the South Carolina Supreme Court.

Respectfully submitted,

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